United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-7046

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For the Second Circuit.

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P/S

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

CANADIAN JAVELIN, LIMITED,
JOHN C. DOYLE,
WILLIAM M. WISMER,

Defendants-Appellees,

SAMUEL H. SLOAN,

Intervenor-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted in response to the answering brief of the S.E.C. None of the other appellees have filed answering briefs. The decision of the court below has been reported as S.E.C. v Canadian Javelin Ltd. 64 F.R.D. 648 (1974).

ARGUMENT

POINT I

THE S.E.C LACKS STANDING TO OBJECT TO INTERVENTION.

The argument which is presented in the answering brief filed in this court by the S.E.C. is that the appellant Samuel H. Sloan ("Sloan") was properly denied intervention in the "Commission's concluded action for an injunction" and that therefore "his arguments with respect to the propriety of the injunctive relief ob-

tained by the Commission in this action are not properly before the court." One obvious flaw and perhaps the fatal flaw in this argument is that there is nothing in the record which demonstrates that this action was "concluded" by the Commission. In the documents which constitute the record, one finds the signatures of Wismer (A-51), Doyle (A-58) and P.J. DeSantis for CJV (A-70). One also finds the signature of the district judge (A-56 and A-67). However, nowhere does one find the signature of an authorized representative of the S.E.C. consenting to the injunction. It follows that since the S.E.C. did not consent, it has no standing to object when a third party seeks to vacate the injunction.

The point was made on page 25 of the appellant's brief and it is one of the "array of arguments with respect to the propriety of the judgments entered" which, according to the S.E.C., "appear to be frivolous" (Brief for S.E.C. p. 11). However, this argument, as well as the other arguments which the S.E.C. attempts to pass over so lightly, is non-frivolous. Furthermore, the argument is deserving of re-emphasis here because none of the remaining parties have filed an answering brief. Therefore, if it can be shown that the S.E.C. has no standing to object, it follows necessarily that the appellant must prevail.

It is not particularly suprising that CJV, Doyle and Wismer have not filed briefs in this case. Indeed, it is reasonable to infer that at this point they would like to see Sloan win. At the time the injunction was entered, it had great publicity value for both CJV and the S.E.C. This is reflected by the fact that both the S.E.C. and CJV issued press releases to announce the entry of the

injunction. The S.E.C. issued its standard press release to the effect that another securities law violation had been brought to justice. CJV issued a glowing report to the effect that it had settled it's problems with the S.E.C. (A-109 to A-111). Undoubtedly, the termination of this lawsuit had publicity value for both sides. Judge MacMahon, too, had reason to be happy because he had one less case to worry about on his overcrowded docket.

The entry of an injunction is a serious matter, not only for the parties but for the court. Once a court has agreed to endorse a permanent injunction it retains jurisdiction and shoulders the responsibility for the perpetual exercize of the court's supervisory powers. When it enters an injunction, a court must be prepared to exercize its contempt powers and to withstand a variety of collateral attacks. For example, in 1920 a consent decree was entered involving the giant meat packers. The district court, at the foot of the decree, retained the power to grant additional relief in the customary way. Some years later, a motion to vacate the decree was made, and the denial of this motion was affirmed by the Supreme Court. United States v Swift & Co. 276 U.S. 311 (1928). Following this, two attempts were made to have the decree modified in light of changed circumstances. United States v Swift & Co. 286 U.S. 106 (1932); United States v Swift & Co. 189 F. Supp. 885, 892 (N.D. Ill. 1960), aff'd. 367 U.S. 909 (1961). The Government then sought to prevent the takeover of one of the parties to the decree. United States v Armour & Co. 398 U.S. 268 (1970). When this question became moot, the Government sought to prevent yet another takeover. United States v Armour & Co. 402 U.S. 673 (1971). Thus,

what started out as a "consent" decree has now made its way through the appellate process to the Supreme Court on five occasions and the door is yet open for further litigation.

The point is that where there has been a procedural irregularity, the courts should not hesitate to strike down an injunction. An injunction must be capable of standing the test of time. The appellant's brief has already demonstrated that the injunction does not meet the requirements of Rules 52(a) and 65(d) F.R. Civ. P. The S.E.C. seems prepared to concede this point. From this it follows that the injunction is a nullity because the procedural irregularities make the contempt power unenforceable. The injunction is a nullity for other reasons all of which have been analyzed in the appellant's brief and need not be recited here. Thus, regardless of whether or not Sloan is permitted to intervene, the injunction must be vacated. Once the injunction is vacated, the question of intervention should be returned to the district court for a fresh determination although there can be little doubt that the right to intervention must be granted. United States v SCRAP 412 U.S. 669 (1973); Medical Committee for Human Rights v S.E.C. 482 F. 2d 659 (D.C. Cir. 1970) dismissed as moot 404 U.S. 403 (1972). However, the district court should be left free to consider other questions, particualrly the question of whether the complaint of the S.E.C. should be dismissed. See Mitchell v Lublin, McGaughy & Associates 358 U.S. 207, 215 (1959).

POINT II

A FAILURE TO REVERSE THE COURT BELOW WILL RESULT IN THE DEPRIVATION OF DUE PROCESS OF LAW.

From the answering brief filed in this appeal, it appears that the S.E.C. has shifted somewhat from the position it took in the court below. For example, in the memorandum filed in the district court, the S.E.C. stated:

> "In S.E.C. v Capital Gains Research Bureau, Inc. 375 U.S. 180, 193 (1963), the Supreme Court held that the'mild prophylactic' of injunctive relief when sought by the Commission under the federal securities laws is not to be circumscribed by rigid standards applicable to injunctions privately sought under common law."

However, the fact is that the Supreme Court, in S.E.C. v Capital Gains Research Bureau, Inc., made no such holding. The Supreme Court has never held that an injunction, when sought by the S.E.C. or by anybody else, constitutes a "mild prophylactic." The holdings by the Supreme Court are entirely contrary. For example, in International Longshoremen's Assn. v Philadelphia Marine Trade Assn. 389 U.S. 64, 76 (1967), the Supreme Court stated:

> "The judicial contempt power is a potent weapon. When it is founded upon a decree to vague to be understood, it can be a deadly one."

This principle was affirmed in Schmidt v Lessard 414 U.S. 473, 476 (1974) where the Supreme Court observed:

> "[T]he specificity provisions of rule 65(d) are no mere technical requirements."

In a similar vein, the Supreme Court, in Brotherhood of L.E. v Missouri-Kansas-T.R. Co., 363 U.S. 528, 532 (1960), stated that it is the duty of the courts to "ensure that extraordinary equitable remedies will not become the engines of injustice." In that decision the Supreme Court cited Inland Steel Co. v United States 306 U.S. 153, 157 (1939) which held that:

"[I]t is the duty of a court of equity granting injunctive relief to do so upon condidtions that will protect all.... whose interest the injunction may affect."

The appellant's brief has already argued vigorously that the order and judgment of the district court does not comply with either Rule 52(a) F.R.Civ. P. or Rule 65(d) F.R. Civ. P. The S.E.C. does not contest this point. Rather, the S.E.C. contends that Sloan has no right to object because, if such an objection were allowed, "the Commission's enforcement program would necessarily be severely curtailed" (Brief for S.E.C. p. 11). However, fundamental Fifth Amendment due process rights require that any person with an interest in the outcome of a proceeding be allowed to intervene. This principle was affirmed in Eisen v Carlisle & Jacquelin 417 U.S. 156 (1974) where the Supreme Court held that all parties with an interest in the outcome a class action are entitled to notice. It would be entirely consistant with that decision for the Court of Appeals to hold that all stockholders of a corporation are entitled to notice before that corporation "consents" to the entry of a civil injunction in an action brought by the S.E.C.

Such a holding would do nothing to impair the ability of the Department of Justice to proceed with the swift prosecution of criminal violations of the anti-trust laws. In American jurisprudence, a private citizen lacks a judicially cognizable interest in the criminal prosecution or non-prosecution of another. Linda R.S. v Richard D. 410 U.S. 614, 619 (1973). Anti-trust "decrees" obtained by the Department of Justice are entirely distinguishable from the type of injunction sought in actions brought by the S.E.C.

In Pernell v Southall Realty 416 U.S. 363, 385 (1974) the Supreme Court stated that "Our courts were never intended to serve as rubber stamps for landlords." It is equally clear that the courts were never intended to serve as rubber stamps for the S.E.C. This was essentially the holding in S.E.C. v Frank 388 F. 2d 486 (2d. Cir. 1968). Judge MacMahon, in endorsing the "consent"obtained here by the S.E.C., was acting as little more than a rubber stamp. It is true that Judge MacMahon did nothing that district court judges have not done for many years. However, this does not make the procedure he followed correct. Clearly, the injunction which he endorsed adversely affected the property rights of all stockholders of CJV and these stockholders were given no opportunity to object.

Another decision which the S.E.C. placed reliance in its memorandum filed in the district court was United States v SCRAP, supra. However, that decision reaches just the opposite conclusion from that which the S.E.C. is urging upon the court. There, the Supreme Court held that SCRAP had standing to challenge regulatory action by the ICC because the members of SCRAP used the forests, streams, and other resources in a certain area for camping, hiking, fishing and sightseeing and such use was directly affected by the adverse environmental impact caused by the nonuse of recyclable goods brought about by the surcharge on such goods. It is fair to state that the possible injury alleged by the members of SCRAP was remote compared to the direct injury to the property rights to stockholders of CJV occasioned by the entry of the "consent" injunction in this case. Therefore, Sloan and all other persons with an interest, however small, should be permitted to intervene.

The fact that the S.E.C. frequently cites cases which reach the opposite conclusion from what the S.E.C. says they reach serves to illustrate the point that it is never a bad idea to read the cases on which the S.E.C. claims to rely. For example, in the brief filed in this court, the S.E.C. relies on NLRB v Jones & Laughlin Steel Corp. 301 U.S. 1 (1937). According to the S.E.C., this case supports the contention that CJV would not be entitled to a jury trial. However, in Curtis v Loether 415 U.S. 189, 194 (1974) the Supreme Court observed that:

> "Jones & Laughlin merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication....."[1]

In Curtis v Loether the Supreme Court established that in all suits in which the claim of a right to an injunction is based upon a statute, the defendant possesses the right to trial by jury.

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1. Jones & Laughlin represents a dramatic turning point in the history of the Supreme Court. The conventional analysis is that from 1890 until 1937 the Supreme Court was concerned primarily with protecting business from governmental interference. These dates represent an era beginning with Chicago M. & St. P. Ry v Minnesota 134 U.S. 418 (1890) and ending with West Coast Hotel Co. v Parrish 300 U.S. 379 (1937); NLRB v Jones & Laughlin Steel Corp. supra and Standard Machine Co. v Davis 301 U.S. 548 (1937). These latter three decisions represent the famous "switch in time" brought about by public pressures resulting from Roosevelt New-Dealism. Final representative decisions of the prior era were Railroad Retirement Bd. v Alton R.R. 295 U.S. 330 (1935); Schechter Poultry Corp. v United States 295 U.S. 495 (1935); Carter v Carter Coal Co. 298 U.S. 238 (1936). It is interesting that the Supreme Court has recently repudiated Jones & Laughlin for the purpose which the S.E.C. makes of it here and has revived Schechter Poultry Corp. by relying on it in National Cable Television v United States 415 U.S. 336 (1974). As Mr. Justice Marshall notes, the last time the Supreme Court relied upon Schechter Poultry was in Carter v Carter Coal Co. See 415 U.S. at 354 n. 2.

Pernell v Southall Realty, supra affirmed this principle. These two decisions leave little doubt that CJV and the other defendants are entitled to a trial by jury if one is properly demanded.

In any event, the claim by the S.E.C. that there are "potentially complicating elements" which require that Sloan's application be denied (Brief p. 13) is without merit. In another decision which the S.E.C. relied upon in the court below and which it has now abandoned, Beacon Theatres v Westover 359 U.S. 500, 508 (1959), the Supreme Court observed that district court judges have the right to control their own dockets. In Penn Central and N & W Inclusion Cases 389 U.S. 486, 497 (1968) the Supreme Court applauded the action of the Second Circuit in seeing to it that all cases pending in that Circuit were placed before one judge in the Southern District of New York. The Supreme Court also observed that a problem arises when related actions are filed in different districts or, worse yet, in different circuits. However, that problem is not present here. All of the litigation between Sloan, the S.E.C. and CJV are pending either in the Southern District of New York or in the United States Court of Appeals for the Second Circuit. The S.E.C., for strategic reasons, has attempted to keep actions instituted by the S.E.C. from being assigned to the same judge to whom an action involving identical questions of law and fact has been assigned. For example, in S.E.C. v Sloan 74 Civil 5729, U.S.C.A. docket no. 75-7056, the S.E.C. went to considerable lengths to have that case assigned to Judge Ward when there was a prior pending related case, Sloan v S.E.C. et al 74 Civil 2792, which had been assigned to Judge Griesa which involved virtually identical issues of law and fact. Tactical measures such as this, which are designed to frustrate the administration of justice,

should be condemned by the courts.

In re National Student Marketing Litigation 368 F. Supp. 1311, 1317 (1973) the Judicial Panel on Multidistrict Litigation rejected all of the arguments advanced in the brief filed by the S.E.C. in this appeal. It is true that Congress reacted by enacting an amendment, Section 21(g) of the Securities Exchange Act of 1934, which exempts what Senate Report No. 94-75 called "law enforcement" actions brought by the S.E.C. from coordination proceedings before the JPML. However, the Senate Report stated that the rationale for this amendment was that in some cases actions brought by the S.E.C. have been, in effect, stayed for a long as seven months while the JPML made up its mind. When multiple districts are not involved that consideration is not present. For example, in the Southern District of New York, actions are routinely transferred from one judge to another in a spirit of mutual cooperation.[2] In any event, consolidation should not be confused with intervention and the question before this court is whether Sloan should be permitted to intervene.

POINT III

THE REMAINING ARGUMENTS ADVANCED BY THE S.E.C. ARE WITHOUT MERIT.

Trying to fit this case into S.E.C. v Everest Management Corp. 475 F. 2d 1236 (2d Cir. 1972) is like trying to fit a square peg into a round hole. The S.E.C. trys to argue that Sloan's "real interest" is not in protecting the shareholders of CJV but rather in

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2. That spirit of mutual cooperation is not always present however. In S.E.C. v Sloan, supra, Judge Ward refused to transfer his case to Judge Griesa. At the same time, while acknowledging that the cases were related, Judge Griesa refused to transfer his case to Judge Ward.

prosecuting his own action against CJV. (Brief p. 9-10). However, in the manner used by the S.E.C., the term "real interest" implies motivation and motivation is not a proper subject for inquiry by the federal courts. The question at the bar is whether Sloan has the right to intervene, not what motivates him to request this right. For example, in Jackson v Statler Foundation 496 F. 2d 623, 629 n 8 (2d. Cir. 1974) this Court quoted an authority which observed:

> "Whether this wish is motivated by pure virtue, a slightly tarnished desire to see a name perpetuated beyond the grave, or nothing more than sheer animal hatred for the Federal Government is not of concern to us."

If intervention is granted, Sloan would be given the right to be heard and little else, at this point. This, in itself, would seem harmless enough. In this light, all of the sputtering by the S.E.C. appears to be an attempt to frustrate the administration of justice. The S.E.C.'s position as self-proclaimed exclusive protector of the public interest in the area of securities transactions is inherently suspect. If the Government could be trusted to fully protect the public there would be no need for a constitution. For this reason, if for no other reason, whenever action by an administrative agency of Government is involved, liberal standards for intervention should be applied and, although intervenors should not be given a free ride, they should not be denied the opportunity to be heard.

CONCLUSION

For all of the reasons set forth above, the decision of the district court should be reversed and the judgments entered by the district court should be vacated.

Respectfully submitted,

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DATED: LYNCHBURG, VIRGINIA
SEPTEMBER 15, 1975

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 22 day of Sept., 1975 deponent served the within Brief upon Securities + Exchange Comm
Diamond + Golomb
Moses Kristove

attorneys(s) for appellee

in this action, at 500 N. Capital St. NW - 800 Engineers Bldg Cleveland Ohio
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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
22 day of Sept, 1975.
William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976